

§ 9701.606

except for a preference eligible employee in the competitive service who has completed the first year of an ISP.

REQUIREMENTS FOR FURLOUGH OF 30 DAYS OR LESS, SUSPENSION, DEMOTION, REDUCTION IN PAY, OR REMOVAL

§ 9701.606 Standard for action.

The Department may take an adverse action under this subpart only for such cause as will promote the efficiency of the service. The standards for mandatory removal offenses and actions taken under the national security provisions are set forth in §§ 9701.607 and 9701.613, respectively.

§ 9701.607 Mandatory removal offenses.

(a) The Secretary has the sole, exclusive, and unreviewable discretion to identify offenses that have a direct and substantial adverse impact on the Department's homeland security mission. Such offenses will be identified in advance as part of the Department's implementing directives, publicized via notice in the FEDERAL REGISTER, and made known to all employees on an annual basis.

(b) When a mandatory removal action is proposed under this section, employees will have the right to advance notice, an opportunity to respond, a written decision, and a review by the Mandatory Removal Panel as set forth in subpart G of this part.

(c) Prior to the issuance of a notice to the employee in question, the Secretary or designee will review and approve a proposed notice of removal on the grounds that the employee has committed a mandatory removal offense.

(d) The Secretary has the sole, exclusive, and unreviewable discretion to mitigate the removal penalty.

(e) Nothing in this section limits the discretion of the Department or any component thereof to remove employees for offenses other than those identified by the Secretary as mandatory removal offenses.

(f) Nothing in this subpart limits the discretion of the Department or any component thereof to remove an em-

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ployee based on the revocation of that employee's security clearance.

§ 9701.608 Procedures.

An employee against whom an adverse action is proposed is entitled to the following:

- (a) A proposal notice under § 9701.609;
- (b) An opportunity to reply under § 9701.610; and
- (c) A decision notice under § 9701.611.

§ 9701.609 Proposal notice.

(a) *Notice period.* The Department must provide at least 15 days advance written notice of a proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department must provide at least 5 days advance written notice.

(b) *Contents of notice.* (1) The proposal notice must inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the Department's evidence supporting the proposed action. The Department may not use evidence that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(2) When some but not all employees in a given competitive level are being furloughed, the proposal notice must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough. The notice is not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(c) *Duty status during notice period.* An employee will remain in a duty status in his or her regular position during the notice period. However, when the Department determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the Department may elect one

or a combination of the following alternatives:

(1) Assign the employee to duties where the Department determines the employee is no longer a threat to safety, the Department's mission, or Government property;

(2) Allow the employee to take leave, or place him or her in an appropriate leave status (annual leave, sick leave, or leave without pay) or absence without leave if the employee has absented himself or herself from the worksite without approved leave; or

(3) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

§9701.610 Opportunity to reply.

(a) The Department must give employees at least 10 days, which must run concurrently with the notice period, to reply orally and/or in writing to a notice of proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department must give the employee at least 5 days, which must run concurrently with the notice period, to reply orally and/or in writing.

(b) The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses.

(c) During the opportunity to reply, the Department must give the employee a reasonable amount of official time to review the Department's supporting evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) The Department must designate an official to receive the employee's written and/or oral response. The official must have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or other representative of the employee's choice and at the employee's expense, subject to paragraph (f) of this section. The employee must provide the Department with a written designation of his or her representative.

(f) The Department may disallow as an employee's representative—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes the Department to consider any medical condition that may be relevant to the proposed adverse action must provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) When considering an employee's medical documentation, the Department may require or offer a medical examination pursuant to 5 CFR part 339, subpart C.

(3) When considering an employee's medical condition, the Department is not required to withdraw or delay a proposed adverse action. However, the Department must—

(i) Allow the employee to provide medical documentation during the opportunity to reply;

(ii) Comply with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules; and

(iii) Comply with 5 CFR 831.1205 when issuing a decision to remove.

§9701.611 Decision notice.

(a) In arriving at its decision on a proposed adverse action, the Department may not consider any reasons for the action other than those specified in the proposal notice.

(b) The Department must consider any response from the employee and the employee's representative, if the response is provided to the official designated under §9701.610(d) during the opportunity to reply, and any medical documentation furnished under §9701.610(g).

(c) The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts E or G of this part.